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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

[Protest of Army Contract Award]

FILE: B-196729

DATE: April 2, 1980

MATTER OF: Hotpack Corporation

DLG04282

DIGEST:

1. Allegation--that contracting agency had shown bias and favoritism toward awardee by amending solicitation twice after receipt of proposals to reduce responsibility requirements awardee could not meet--which is first raised at GAO by protester approximately 6 weeks after notice of award is untimely irrespective of whether protest is characterized as one against issuance of amendments, award following amendments, or subsequent protest to GAO following adverse agency action.
2. After receiving agency's notice of award dated October 29, 1979, which indicated that amendments to solicitation were sent only to two companies which submitted offers, including protester, assertion first raised in December 15, 1979, letter--that agency should have canceled solicitation and issued new one so that other companies originally solicited would have opportunity to make offer based on changed requirements--is untimely.

The protest was dismissed

DLG04283
Hotpack Corporation (Hotpack) protests the award of a contract to Mid-Atlantic Laboratory Equipment Co. (Mid-Atlantic) under negotiated solicitation No. DADA15-79-R-0042 issued by the Department of the Army, Walter Reed Army Medical Center. The solicitation was for the supply and installation of a controlled environmental chamber.

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The Army issued the solicitation on April 26, 1979, with a closing date for receipt of offers of May 18, 1979. However, on May 15, 1979, the Army issued an amendment extending the closing date indefinitely pending a possible revision to the solicitation's specifications.

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The solicitation originally stated in paragraph 18, part I, section "B," that offerors were to indicate in their offers where the same or similar equipment had been in clinical use for a minimum of 5 years. Paragraph 1.02A(1), part II, section "F," required offerors to be manufacturers and prove satisfactory installations of a controlled environmental chamber of the size and scope specified in the solicitation for at least 2 years. By amendment 0002, dated July 19, 1979, the Army changed paragraph 18 of section "B" to require only that offerors indicate where the same or similar equipment has been in clinical use. The amendment also set a new closing date of August 3, 1979. Negotiations were then conducted with the two offerors that responded to the solicitation, Hotpack and Mid-Atlantic, and August 24, 1979, was established as the closing date for the receipt of best and final offers.

After evaluating the best and final offers of Hotpack and Mid-Atlantic, the contracting officer concluded that the low offeror, Mid-Atlantic, did not qualify as a manufacturer having a record of satisfactory installations of environmental chambers for at least 2 years. The contracting officer then contacted the activity which would be using the chamber. The activity informed the contracting officer that the manufacturer and 2-year record of satisfactory installation requirements were unnecessary and that it had no objection to amending the solicitation. Consequently, the contracting officer issued amendment 0003 on October 5, 1979, which reduced the requirements in paragraph 1.02A, section "F," to require only that the offeror prove that it had made "satisfactory installations of a similar controlled environmental chamber." This amendment also set October 22, 1979, as the closing date for second best and final offers. Timely second best and final offers were subsequently received from Hotpack and Mid-Atlantic. An award was made to Mid-Atlantic on October 29, 1979, and Hotpack was notified by letter of that date.

X Hotpack first contends that the Army has shown bias and favoritism toward Mid-Atlantic by waiving the original responsibility requirements. Hotpack believes that when the Army discovered that Mid-Atlantic did not meet the qualifications and requirements, it should have rejected Mid-Atlantic's offer.

Instead, Hotpack claims, the contracting officer proceeded by a series of amendments to change the requirements to accommodate the predetermined selection of Mid-Atlantic. Hotpack asserts that the Army's knowledge of Mid-Atlantic's inability to meet the requirements resulted from continuing contacts by Hotpack with the contracting officer during the procurement, which the protester characterizes as protests. Also, according to Hotpack, these amendments were made after offers were submitted and made public and were thus prejudicial.

We believe that this basis of Hotpack's protest is untimely filed and not for consideration. The record shows that Hotpack was aware of the second and third amendments to the solicitation because they were acknowledged by the company's Contract Manager on July 25, 1979, and October 16, 1979, respectively, as part of the firm's best and final offers. Furthermore, Hotpack claims that the amendments followed protests by it against Mid-Atlantic's acceptability; therefore, the impact of the amendments on the Mid-Atlantic acceptability were clearly known prior to the submission of Hotpack's two best and final offers. Hotpack did not submit its protest to this Office until November 8, 1979. Even then, the firm only argued that the Army failed to apply the responsibility criteria originally set forth in the solicitation; Hotpack's initial protest made no mention of the two amendments which changed the responsibility requirements. It was not until after the Army pointed out in a report to us dated December 3, 1979, that Hotpack's protest was moot because of the issuance of the two amendments that Hotpack then raised the issue that the amendments were issued to accommodate Mid-Atlantic in a December 15, 1979, letter. Hotpack's postaward protest essentially against the solicitation's amendments is untimely for failure to have been filed prior to the submissions of its best and final offers. See 4 C.F.R. § 20.2(b)(1) (1979).

To the extent Hotpack's protest can be considered to be against the award after the alleged prejudicial amendments, the December 15 letter was not filed within 10 days after the basis of the protest was or should have been known, that is, the receipt of the October 29 letter from the agency. In conclusion, while the record is unclear as to whether Hotpack protested to the agency about the amendments, the award constituted adverse agency action;

consequently, the December 15 letter untimely raised the issue. 4 C.F.R. § 20.2(a) (1979).

Hotpack also asserts in the December 15 letter that the Army should cancel the solicitation and reissue a new one so that other suppliers of environmental rooms will have the opportunity to make an offer under the changed responsibility requirements. Hotpack points out that, while the Army sent the original solicitation to 21 companies, the contracting officer sent the amendments only to the two responding offerors, including Hotpack.

The agency letter to Hotpack of October 29 indicated that only Hotpack and Mid-Atlantic were participating in the procurement after the initial closing date. Moreover, the protester's December 15 letter which raises this issue for the first time, does not show that Hotpack believed otherwise after receipt of the October 29 letter. Therefore, this basis of protest is untimely 4 C.F.R. § 20.2(b)(2) (1979).

We do note, however, that amendment 0003, issued on October 5, 1979, after receipt of offers, considerably broadened the potential field of competition; yet it was not sent to any of the 21 companies originally solicited, except the two responding offerors. In view of the potential impact of this amendment, we believe consideration should have been given to cancellation, revision and reissuance of the solicitation to all 21 firms. See Defense Acquisition Regulation § 3-805.4(b) (1976). Nevertheless, we are not recommending any remedial action since award was made in October with installation to be completed within 100 calendar days.

The protest is dismissed.

for *Kerry R. Van Cleave*
Milton J. Socolar
General Counsel